Indrani a/p Ramasamy v Lembaga Kelayakan Profesion Undang-Undang, Malaysia

HIGH COURT (KUALA LUMPUR) — ORIGINATING SUMMONS NOS R1–17–36 OF 2005, R1–17–38 OF 2005 AND R1–17–39 OF 2005
RAUS SHARIF J
25 JULY 2006

Administrative Law — Exercise of administrative powers — Delegation — Legal Profession Qualifying Board delegating its power to investigate charges against the three plaintiffs — Full inquiry conducted by the panel — Board decided otherwise despite of panel's findings — Whether board's findings an error of law

Civil Procedure — Mode of commencement — Originating summons — Disciplinary Board/Committee — Findings of — Whether plaintiffs should have applied for judicial review of the board's decision

Legal Profession — Disciplinary proceedings — Disciplinary Board/Committee — Findings of — Whether supported by evidence

There were three originating summons ('three OS') before this court and were consolidated and ordered to be heard jointly. The plaintiffs in the three OS were candidates who sat for the Certificate of Legal Practice ('CLP') in the July 2001 examination. The defendant in the three OS is the Legal Profession Qualifying Board (the board) established under s 4 of the Legal Profession Act 1976 ('LPA'). The board conducted the CLP examination. All the plaintiffs passed the examination. But, on 12 November 2001, the board decided to annul the results due to a reported leakage of the examination papers. The plaintiffs, amongst others, were arrested by the police as they were alleged to have purchased the CLP examination papers from one Ramli bin Md Mokhtar, an employee of the board. On 26 November 2001, the board reconsidered its earlier decision of annulling the examination results, and decided that the candidates who had passed the July 2001 examination will continue to retain their pass status subject to the Board's right to nullify any result if they are found to have been obtained through any form of impropriety. On 31 July 2003, the Deputy Public Prosecutor ('DPP') informed the board that the plaintiffs will not be charged arising from their arrest and recommended that disciplinary action should be taken by the board against the plaintiffs. On 9 August 2003, the board issued separate show cause notices to the plaintiffs specifying the charges against them. All of them denied the charges. The board thereafter set up two panels, to investigate into the matter. The plaintiffs appeared separately before the panels. The third and fourth plaintiffs appeared before the first panel while the first, second and fifth plaintiffs appeared

before the second panel. Both panels conducted a thorough investigation of the charges against the plaintiffs. The hearings were conducted for several days where witnesses as well as the plaintiffs were called to testify before the panels. At the hearing, the plaintiffs were represented by counsel and was allowed to submit on facts and law before the panels. The first panel in its report dated 24 September 2004 found that the charges were proven against the third and fourth plaintiffs and recommended that the third and fourth plaintiffs be barred from sitting in the forthcoming CLP examination in 2005 and only be allowed to sit for CLP examination in 2006. The second panel in its report dated 4 November 2004 found that the charges against the first, second and fifth plaintiffs were not proven. On 17 February 2005, the plaintiffs were separately notified that they have to appear before the board on 4 March 2005 to make representations to the board on the same charges alleged against them. A copy of the panel's report was attached to the notices. On 4 March 2005, the plaintiffs separately appeared before the board with their counsel. The board subsequently found the plaintiffs guilty of the charges. In so deciding the board by its letter dated 16 March 2005 accepted the first panel's report but rejected the second panel's report dated 4 November 2004. Hence, these three OS filed by the plaintiffs. Basically, the plaintiffs in the three OS, were seeking a declaration that the July 2001 examination results of the plaintiffs as announced by the board on 19 September 2001 to be confirmed as correct and be released to them. The board, in opposing the three OS argued that the three OS constituted an abuse of process of court as the plaintiffs should have applied for judicial review of the board's decision dated 16 March 2005 and the board's decision of 14 May 2005 under O 53 of the Rules of the High Court 1980 ('RHC'). Secondly, the board had given every opportunity to the plaintiffs to be heard and had acted fairly at all times and thirdly the board's decision dated 16 March 2005 and the board's decision of 14 May 2005 had been made after considering all relevant considerations and the board had not taken into account any irrelevant factor.

Held, allowing the first, second and fifth plaintiffs' application with costs whereas dismissing the third and fourth plaintiffs' application by with cost:

(1) The filing of the three OS is not an abuse of the process of the court. The applications by the plaintiffs in the three OS are in relation to the status of their CLP results and their rights in respect of the said CLP examination paper which they had passed. So, surely it is a matter on which the court has the jurisdiction to grant the declaratory relief by virtue of s 41 of the Specific Relief Act 1950 (see para 28).

(2) No doubt the effect of the declaration would be tantamount to the granting of *certiorari* or *mandamus* by implication. But the nature of declaratory relief is such that even so often the relief when granted will invalidate some offending action or decision. To argue that therefore no declaration should be granted would be to set limitation on granting of declaratory relief against the established judicial opinion that the power of the court to grant declaratory relief is almost unlimited and only limited by its discretion (see *Loganathan v Lembaga Kelayakan Profesion Undang-Undang* [1997] 5 MLJ 237) (see para 30).

(3) The English O 53 is *pari materia* with our O 53 of RHC. However, our courts should be slow in accepting or adopting the *O' Reilly v Mackman* [1988] AC 533 principle because there have been a long line of subsequent English decisions from the House of Lords and the Court of Appeal which have deviated from and distinguished themselves from the strict interpretation in *O' Really v Mackman*. Accordingly, the three OS were properly brought before this court and should be heard on its merits (see para 32)

(4) The third and fourth plaintiffs have no grounds to complain. The first panel after a throughout inquiry had found the charges against them proven. The board accepted the panel's report and found them guilty of the charges. It is trite law that in a proceeding of this nature, the court's function is only to review the decision of the public authority and not to act as an appellate body and rehear the case. But, if it can be shown that the finding of the public authority is perverse or totally unsupported by evidence the court is without doubt has the duty to intervene. In the instance case, after examining the first panel's report, it cannot be said that the findings of the panel are perverse, or totally unsupported by evidence. Neither had the panel considered irrelevant considerations or acted unfairly (see para 39).

(5) The same cannot be said with regard to the decisions of the board in respect the first, second and fifth plaintiffs. This is because the findings of the second panel were clear and unequivocal that *there was no evidence before us, circumstances or otherwise, that will allow us to conclusively hold that the student was guilty*. But in spite of the second panel's findings the board decided otherwise. The question is, on what basis did the board found the first, second and fifth plaintiffs guilty of the charges (see para 45).

(6) The board has no basis to conclude that the first, second and fifth plaintiffs were guilty of the charges. No doubt, the first, second and fifth plaintiffs were called again to appear before the board to answer the charges, but at the hearing before the board, the board heard no witnesses and perused no new documents. Thus, it appears that the board relied solely on the report of the second panel in deciding on the guilt of the first, second and fifth plaintiffs. But as stated earlier the second panel found the three plaintiffs not guilty of the charges (see para 46).

(7) In this case, the board had chosen to delegate its power to investigate the charges against the three plaintiffs to the second panel. A full inquiry was conducted by the second panel where evidence were recorded from witnesses, including the plaintiffs. The witnesses as well as the plaintiffs were subjected to cross-examination and at the conclusion of the inquiry, the second panel found that there was no evidence to hold the students ie, the first, second and fifth plaintiffs, guilty of receiving the question papers from Ramli bin Md Mokhtar before the date of the examination. Hence, there was no basis for the board to conclude that the first, second and fifth plaintiffs were guilty of the charges. From the manner the proceedings before the board were conducted, it was obvious that board did not conduct another inquiry. The board relied solely on the report of the second panel. Hence, the board's findings were completely

unsupported by evidence. A finding with having no evidence to support is clearly an error of law (see para 48).

[Bahasa Malaysia summary

Terdapat tiga saman pemula ('tiga SP') sebelum mahkamah dan digabungkan serta diperintahkan untuk didengarkan bersama. Plaintif-plaintif dalam tiga SP adalah calon-calon yang telah menduduki Sijil Amalan Guaman ('SAG') pada peperiksaan Julai 2001. Defendan di dalam tiga SP adalah Lembaga Kelayakan Profesyen Undang-Undang ('lembaga tersebut) yang ditubuhkan di bawah s 4 Akta Profesyen Undang-Undang 1976 ('APU'). Lembaga tersebut menjalankan peperiksaan SAG. Kesemua plaintif-plaintif lulus peperiksaan tersebut. Tetapi, pada 12 November 2001, lembaga tersebut memutuskan untuk membatalkan keputusan oleh kerana terdapat laporan kebocoran pada kertas peperiksaan. Plaintif-plaintif, di antara yang lain, telah ditangkap oleh polis oleh kerana mereka dikatakan telah membeli kertas peperiksaan SAG tersebut daripada Ramli bin Md Mokhtar, seorang pekerja lembaga tersebut. Pada 26 November 2001, lembaga tersebut mengkaji semula keputusannya yang terdahulu untuk membatalkan keputusan ujian, dan memutuskan bahawa calon-calon yang lulus peperiksaan Julai 2001 akan terus mengekalkan status kelulusan mereka tertakluk kepada hak lembaga membatalkan sebarang keputusan sekiranya mereka didapati telah memperolehi melalui sebarang cara yang salah. Pada 31 Julai 2003, Timbalan Pendakwa Raya ('TPR') memaklumkan kepada lembaga tersebut bahawa plaintif-plaintif yang ditangkap tidak akan dituduh dan mencadangkan bahawa tindakan tatatertib patut diambil oleh lembaga tersebut terhadap plaintif-plaintif. Pada 9 Ogos 2003, lembaga tersebut mengeluarkan notis tunjuk sebab secara berasingan kepada plaintif-plaintif membutirkan tuduhan-tuduhan terhadap mereka. Kesemua mereka menafikan tuduhan-tuduhan tersebut. Selepas itu lembaga tersebut membentuk dua panel, untuk menyiasat perkara tersebut. Plaintif-plaintif menghadirkan diri secara berasingan di hadapan panel-panel tersebut. Plaintif ketiga dan keempat menghadirkan diri di hadapan panel pertama sementara plaintif pertama, kedua dan kelima menghadirkan diri di hadapan panel kedua. Kedua-dua panel menjalankan siasatan secara menyeluruh tuduhan-tuduhan tersebut terhadap plaintif-plaintif. Pendengaran telah dijalankan untuk beberapa hari di mana saksi-saksi dan juga plaintif-plaintif dipanggil untuk memberi keterangan di hadapan panel-panel tersebut. Semasa pendengaran, plaintif-plaintif diwakili oleh peguamcara mereka dan dibenarkan untuk berhujah atas fakta-fakta dan undang-undang di hadapan panel-panel tersebut. Panel pertama dalam laporannya yang bertarikh 24 September 2004 mendapati tuduhan-tuduhan terhadap plaintif ketiga dan keempat telah dibuktikan dan mencadangkan bahawa plaintif ketiga dan keempat dihalang daripada menduduki peperiksaan SAG yang akan datang pada 2005 dan hanya dibenarkan menduduki peperiksaan SAG pada 2006. Panel kedua dalam laporannya bertarikh 4 November 2004 mendapati bahawa tuduhan-tuduhan terhadap plaintif-plaintif pertama, kedua dan kelima tidak dapat dibuktikan. Pada 17 Februari 2005, plaintif-plaintif dimaklumkan secara berasingan bahawa mereka dikehendaki hadir di hadapan lembaga tersebut pada 4 Mac 2005 untuk membuat pernyataan kepada lembaga tersebut atas tuduhan-tuduhan yang sama yang didakwa terhadap mereka. Sesalinan laporan panel dilampirkan pada

notis-notis tersebut. Pada 4 Mac 2005, plaintif-plaintif secara berasingan hadir di hadapan lembaga tersebut bersama peguamcara mereka. Lembaga tersebut seterusnya telah mendapati plaintif-plaintif adalah bersalah atas tuduh-tuduhan tersebut. Dalam membuat keputusannya, lembaga tersebut melalui suratnya yang bertarikh 16 Mac 2005 menerima laporan panel pertama tetapi menolak laporan panel kedua yang bertarikh 4 November 2004. Dengan itu, tiga SP ini difailkan oleh plaintif-plaintif. Pada asasnya, plaintif-plaintif dalam tiga SP menuntut satu deklarasi bahawa keputusan peperiksaan plaintif-plaintif di Julai 2001 seperti yang diberikan oleh lembaga tersebut pada 19 September 2001 ditetapkan sebagai betul dan diserahkan kepada mereka. Lembaga tersebut, dalam mempertikaikan tiga SP menghujahkan bahawa tiga SP adalah satu penyalahgunaan proses mahkamah oleh kerana plaintif-plaintif sepatutnya memohon satu kajian semula kehakiman keputusan lembaga tersebut yang bertarikh 16 Mac 2005 dan keputusan 14 Mei 2005 lembaga tersebut di bawah A 53 Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT). Keduanya, lembaga tersebut telah memberi segala peluang untuk plaintif-plaintif untuk diperdengarkan dan telah bertindak secara adil pada kesemua masa dan ketiganya, keputusan lembaga bertarikh 14 Mei 2005 telah dibuat selepas mempertimbangkan segala pertimbangan yang bersesuaian dan lembaga tersebut tidak mengambil kira faktor-faktor yang tidak bersesuaian.

Diputuskan, permohonan plaintif pertama, kedua dan kelima dibenarkan dengan kos manakala permohonan defendan ketiga dan keempat ditolak dengan kos.

(1) Pemfailan tiga SP tersebut bukannya satu penyalahgunaan proses mahkamah. Permohonan-permohonan oleh plaintif-plaintif dalam tiga SP adalah berhubungan dengan status keputusan SAG mereka dan hak-hak mereka berhubungan dengan kertas ujian SAG tersebut yang mana mereka telah lulus. Dengan itu, semestinya ianya adalah satu perkara yang mana mahkamah ini mempunyai bidangkuasa untuk memberikan relif deklarasi di bawah s 41 Akta Relief 1950 (lihat perenggan 28).

(2) Tidak boleh diragukan bahawa kesan sesuatu deklarasi adalah sama seperti memberikan *certiorari* atau *mandamus* secara implikasi. Akan tetapi sifat relif deklarasi ialah apabila relif ini diberikan, ia akan membuktikan ketidak benaran sesuatu tindakan atau keputusan. Dengan mengemukakan bahawa tiada deklarasi patut diberikan akan menghadkan pemberian relif deklaratori terhadap pendapat kehakiman yang mantap yang mana kuasa mahkamah memberikan relif deklarasi adalah hampir tidak terhad dan hanya terhad mengikut budibicaranya (lihat *Loganathan v Lembaga Kelayakan Profesion Undang-Undang* [1997] 5 MLJ 237) (lihat perenggan 30).

(3) Aturan 53 Inggeris adalah *pari materia* dengan A 53 KMT kami. Akan tetapi mahkamah tidak harus cepat dalam menerimapakai atau menyerap prinsip dalam kes *O' Reilly v Mackman* [1988] AC 533 kerana banyak keputusan daripada House of Lords dan Mahkamah Rayuan selepas kes tersebut yang mana mereka menyimpang dan membezakan daripada pentafsiran yang tegas

dalam *O' Reilly v Mackman*. Oleh yang demikian, tiga SP dikemukakan dengan betul di hadapan mahkamah ini dan sepatutnya di dengar atas merit (lihat perenggan 32).

(4) Plaintif ketiga dan keempat tidak mempunyai alasan untuk mengadu. Panel pertama selepas satu penyiasatan secara keseluruhannya telah mendapati tuduhan-tuduhan terhadap mereka dibuktikan. Lembaga tersebut menerima laporan panel dan mendapati mereka bersalah atas tuduhan-tuduhan tersebut. Adalah undang-undang tetap dalam prosiding sebegini, fungsi mahkamah ialah hanya untuk mengkaji keputusan pihak berkuasa awam dan bukan bertindak sebagai badan rayuan untuk mendengar semula kes tersebut. Tetapi, sekiranya ia dapat ditunjukkan bahawa penemuan pihak berkuasa awam tersebut adalah berlawanan dan langsung tidak disokong oleh bukti mahkamah tentunya mempunyai tanggungjawab untuk campurtangan. Dalam kes ini, setelah meneliti laporan panel pertama, ia tidak boleh dikatakan bahawa penemuan panel tersebut adalah berlawanan dan langsung tidak disokong oleh bukti. Ia juga tidak boleh dikatakan panel tersebut mengambil kira pertimbangan yang tidak relevan atau bertindak secara tidak adil (lihat perenggan 39).

(5) Akan tetapi perkara yang sama tidak boleh dikatakan berhubungan dengan keputusan lembaga tersebut berhubung dengan plaintif-plaintif pertama, kedua dan kelima. Ini adalah kerana penemuan panel kedua adalah jelas dan tidak taksa bahawa tiada bukti sebelum kami, dalam keadaan-keadaan atau sebaliknya, yang membenarkan kami untuk secara konklusif menyatakan calon-calon tersebut bersalah. Akan tetapi walaupun penemuan panel kedua, lembaga telah memutuskan sebaliknya. Persoalannya, atas dasar apakah lembaga tersebut mendapati plaintif pertama, kedua dan kelima bersalah atas pertuduhan tersebut (lihat perenggan 45).

(6) Lembaga tersebut tidak mempunyai asas untuk menyimpulkan bahawa plaintif pertama, kedua dan kelima adalah bersalah atas pertuduhan tersebut. Tidak diragui plaintif pertama, kedua dan kelima telah dipanggil untuk menghadirkan diri sekali lagi di hadapan lembaga tersebut bagi menjawab pertuduhan tersebut, akan tetapi semasa pendengaran di hadapan lembaga tersebut, lembaga tersebut tidak mendengar saksi-saksi dan meneliti dokumen-dokumen baru. Dengan ini, ia kelihatan bahawa lembaga tersebut hanya bergantung kepada laporan panel kedua dalam membuat keputusan atas kesalahan plaintif pertama, kedua dan kelima tersebut. Tetapi seperti yang dinyatakan sebelum ini panel kedua telah membuat penemuan bahawa ketiga-tiga plaintif tidak bersalah atas tuduhan-tuduhan tersebut (lihat perenggan 46).

(7) Dalam kes ini, lembaga tersebut telah memilih untuk mewakilkan kuasanya untuk menyiasat pertuduhan tersebut terhadap ketiga-tiga plaintif kepada panel kedua. Satu siasatan penuh telah diadakan oleh panel kedua di mana bukti-bukti direkodkan daripada saksi-saksi, termasuk plaintif-plaintif. Saksi-saksi tersebut dan juga plaintif-plaintif disoal balas dan juga pada akhir penyiasatan, panel kedua telah mendapati tiada bukti untuk menyatakan

calon-calon tersebut, iaitu plaintif pertama, kedua dan kelima bersalah menerima kertas soalan daripada Ramli bin Md Mokhtar sebelum tarikh peperiksaan. Oleh yang demikian, adalah tidak berasas lembaga tersebut menyimpulkan bahawa plaintif pertama, kedua dan kelima adalah bersalah atas tuduhan-tuduhan tersebut. Daripada cara prosiding di hadapan lembaga tersebut dijalankan, adalah jelas lembaga tersebut tidak menjalankan satu lagi penyiasatan. Lembaga tersebut hanya bergantung sepenuhnya atas laporan panel kedua. Oleh yang demikian, penemuan lembaga tersebut adalah tidak disokong langsung oleh bukti. Satu penemuan tanpa sebarang bukti untuk menyokong adalah jelas ia satu kesilapan undang-undang(lihat perenggan 48).]

Notes

For cases on delegation see 1 *Mallal's Digest* (4th Ed, 2005 reissue) paras 17–19.
For cases on disciplinary proceedings generally, see 9 *Mallal's Digest* (4th Ed, 2005 reissue) paras 1559–1560.
For cases on mode of commencement by originating summons, see 2 *Mallal's Digest* (4th Ed) Consolidated Subject Index paras 4291–4297.

Cases referred to

Abdul Razak Ahmad v Majlis Bandaraya Johor Bahru [1995] 2 MLJ 287 (refd)
Ah San v Majlis Bandaraya Ipoh [2006] 2 MLJ 179 (refd)
Attorney General of Hong Kong v Zauyah Wan Chik [1995] 2 MLJ 260 (refd)
Herring v Templeman [1973] 3 All ER 569 (refd)
Loganathan v Lembaga Kelayakan Profesion Undang-Undang [1997] 5 MLJ 237 (refd)
Lonhro plc v Tebbit and Another [1992] All ER (refd)
O'Reilly v Mackman [1988] AC 533 (refd)
Roy v Kensington & Chelsea & Westminster Family Practitioner Committee [1992] AC 624 (refd)
Subramaniam a/l Vythilingam v The Human Rights Commission of Malaysia [2003] MLJU 94 (refd)
TR Lampoh ak Dana v Government of Sarawak [2005] 6 MLJ 371 (refd)
Tan Sri Othman Saat v Mohd bin Ismail [1982] 1 LNS 2; [1982] 2 MLJ 177 (refd)
Teh Guan Teik v Inspector General of Police [1998] 3 MLJ 137 (refd)
Trustee of Dennis Rye Pension Fund & Anor v Sheffield City Council [1998] 1 WCR 840 (refd)

Legislation referred to

Courts of Judicature Act 1964
Legal Profession Act 1976 s 4
Rules of the High Court 1980 O 15 r 16, O 53
Specific Relief Act 1950 s 41

V Manokaran (Nordin Torji & Partners) for the plaintiff in R1–17–36 of 2005.
PM Mahalingam (PM Mahalingam & Co) for the plaintiff in R2–17–38 of 2005.
HK Teh (HK Teh & Associates) for the plaintiff in R1–17–39 of 2005.
Wong Kian Kheong, Karen Lee Fong Voon (Lee Hishamuddin Allen & Gledhill) for the defendant.

Raus Sharif J (now JCA):

FACTUAL BACKGROUND

[1] There are three originating summons ('three OS') before this court:

(i) R1–17–36–05;

(ii) R2–17–38–05; and

(iii) R1–17–39–05,

[2] On 9 March 2006, by the order of this court, the three OS were consolidated and ordered to be heard jointly.

[3] The plaintiffs in the three OS, ie Indrani a/p Ramasamy ('first plaintiff'), Ramachandran a/l Manikam ('second plaintiff'), Miclamani a/l S Sanda ('third plaintiff'), Kuldip Singh a/l Gian Singh (fourth plaintiff'), Ramesh Raman a/l Raman ('fifth plaintiff') were candidates who sat for the Certificate of Legal Practice ('CLP') examination in the July 2001 examination.

[4] The defendant in the three OS is the Legal Profession Qualifying Board ('the board') established under s 4 of the Legal Profession Act 1976 ('LPA'). The board conducted the CLP examination.

[5] The July 2001 CLP examination results were published by the board on 19 September 2001. All the plaintiffs passed the examination. But, on 12 November 2001, the board decided to annul the results due to a reported leakage of the examination papers.

[6] The plaintiffs, amongst others, were arrested by the police and remanded for a few days in order to assist the police investigation. The plaintiffs were alleged to have purchased the CLP examination papers from one Ramli bin Md Mokhtar, an employee of the board.

[7] On 26 November 2001, the board reconsidered its earlier decision of annulling the examination results, and decided that the candidates who had passed the July 2001 examination will continue to retain their pass status subject to the board's right to nullify any result if they are found to have been obtained through any form of impropriety. In the press statement on 29 November 2001, the board announced that it would verify with the police in respect of the candidates arrested by the police in relation to the leakage and if the candidates were implicated, the board would nullify their results.

[8] On 31 July 2003, the board received reports on the plaintiffs from Deputy Public Prosecutor ('DPP') informing the board that the plaintiffs will not be charged

arising from their arrest. Instead, the DPP recommended that disciplinary action should be taken by the board against the plaintiffs.

[9] On 9 August 2003, the board issued separate show cause notices to the plaintiffs. The charges against them were specified in the show cause letter. Basically they were charged to have obtained copies of examination papers, prior to the examination from Ramli bin Md Mokhtar, an employee of the board.

[10] The plaintiffs gave their respective written explanations to the board. All of them denied the charges.

[11] The board thereafter set up two panels, to investigate into the matter. Each panel comprises of three members.

[12] The first panel comprise of Dato Hj Yaacob bin Ismail, Mr Rajeswaran and Mr Chandrasegran. The second panel comprise of Mr Ong See Seng, Miss Ambiga Sreenevasan and Prof Madya Dr Mohd Ismail bin Mohd Yunus.

[13] The plaintiffs appeared separately before the panels. The third and fourth plaintiffs appeared before the first panel while the first, second and fifth plaintiffs appeared before the second panel.

[14] Both panels conducted a throughout investigation of the charges against the plaintiffs. The hearings were conducted for several days where witnesses as well as the plaintiffs were called to testify before the panels. At the hearing the plaintiffs were represented by counsel and was allowed to submit on facts and law before the panels.

[15] The first panel in its report dated 24 September 2004 found that the charges were proven against the third and fourth plaintiffs and recommended that the third and fourth plaintiffs be barred from sitting in the forthcoming CLP examination in 2005 and only be allowed to sit for CLP examination in 2006.

[16] The second panel in its report dated 4 November 2004 found that the charges against the first, second and fifth plaintiffs were not proven.

[17] On 17 February 2005, the plaintiffs were separately notified that they have to appear before the board on 4 March 2005 to make representations to the board on the same charges alleged against them. A copy of the panel's report was attached to the notices.

[18] On 4 March 2005, the plaintiffs separately appeared before the board with their counsel. The board subsequently found the plaintiffs guilty of the charges. In so deciding the board accepted the first panel's report but rejected the second panel's report.

[19] On 14 May 2005, the board wrote to the plaintiffs individually informing:

(i) first plaintiff would have to resit all four papers of the CLP examination in the year 2006;

(ii) second plaintiff would have to resit for CLP examination in 2006 for five papers;

(iii) third plaintiff would have to resit for CLP examination in 2006 for five papers;

(iv) fourth plaintiff would have to resit for CLP examination in 2006 for two papers; and

(v) fifth plaintiff would have to resit for CLP examination in 2006 for two papers.

[20] Hence, these three OS filed by the plaintiffs.

[21] The first plaintiff in OS No R1–17–36–05 was seeking, amongst others:

(i) Whether the decision of the board of 14 May 2005, in finding the first plaintiff guilty of the charges as in the show cause letter is fair and just in view of the first panel finding that the charges against the first plaintiff were not proven. If the answer to the above question is in favour of the first plaintiff, she is seeking the followings:

(a) an order to set-aside the board decision of 14 May 2005;

(b) a declaration that the July 2001 CLP examination results is valid and should be reinstated.

[22] The second, third and fourth plaintiffs in OS No R2–17–38–05 were seeking amongst others:

(i) a review of the board's decision;

(ii) an order to set-aside the board's decision; and

(iii) a declaration that the July 2001 examination results of second plaintiff, thirrd plaintiff and fourth plaintiff to be confirmed as correct and be released to them within seven days from the date of this declaration.

[23] The fifth plaintiff in OS No R1–17–39–05 was seeking from this court, amongst others:

(i) to review the decision of the board by its letter dated 16 March 2005 to reject the findings of the first panel dated 4 November 2004;

(ii) to review of the decision of the board by its letter dated 14 May 2005 requiring the fifth plaintiff to resit two papers for CLP examination in 2006;

(iii) a declaration that the July 2001 examination results of fifth plaintiff be confirmed as correct and be released to him within seven days from the date of this declaration.

[24] Basically, the plaintiffs in the three OS, were seeking a declaration that the July 2001 examination results of the plaintiffs as announced by the board on 19 September 2001 to be confirmed as correct and be released to them.

[25] The board, in opposing the three OS advanced the following grounds:

(i) The three OS constituted an abuse of process of court as the plaintiffs should have applied for judicial review of the board's decision dated 16 March 2005 and the board's decision of 14 May 2005 under O 53 of the Rules of the High Court 1980 ('RHC');

(ii) The board had given every opportunity to the plaintiffs to be heard and had acted fairly at all times;

(iii) The board's decision dated 16 March 2005 and the board's decision of 14 May 2005 had been made after considering all relevant considerations and the board had not taken into account any irrelevant factor;

(iv) The court should be slow to interfere with the board's findings and decisions; and

(v) Assuming the court decide that it has the discretion to grant the declarations, certiorari and mandamus sought in this case, the totality of the facts of this case do not support the exercise of its discretion to grant such remedies in favour of the plaintiffs.

PRELIMINARY ISSUE

[26] Learned counsel for the board, Mr KK Wong submitted that the three OS is an abuse of the process of the court and ought to be struck out on the ground that the plaintiffs ought to apply for judicial review pursuant to O 53 of RHC. According to Mr KK Wong, the new O 53 of RHC clearly provides a comprehensive public law procedure of judicial review of decision of any public authority such as the board. Mr KK Wong relied on four High Court cases to support his argument namely:

(i) *Subramaniam a/l Vythilingam v The Human Rights Commission of Malaysia* [2003] MLJU 94;

(ii) *TR Lampoh ak Dana v. Government of Sarawak* [2005] 6 MLJ 371;

(iii) *Ah San v Majlis Bandaraya Ipoh* [2006] 2 MLJ 179; and

(iv) *Abdul Razak Ahmad v Majlis Bandaraya Johor Bahru* [1995] 2 MLJ 287.

[27] Learned counsels for the plaintiffs, collectively contended that Mr KK Wong's contention would be correct if the plaintiffs were seeking the relief of certiorari or mandamus. According to them, O 53(1)(1) clearly states that the order shall govern all applications seeking the relief specified in para 1 of the Schedule of the Courts of Judicature Act 1964 and the purpose therein specified and the purpose therein specified does not include declarations. They submitted that declarations are not included in para 1 of the Schedule to the Courts of Judicature Act 1964. This is

because of the specific provision for declarations as provided under s 41 of the Specific Relief Act 1950 ('SRA') and O 15 r 16 of the RHC. They relied on the following cases to support their arguments:

(i) *Teh Guan Teik v Inspector General of Police* [1998] 3 MLJ 137;

(ii) *Attorney General of Hong Kong v Zauyah Wan Chik* [1995] 2 MLJ 260 ;

(iii) *Tan Sri Othman Saat v Mohd bin Ismail* [1982] 1 LNS 2; [1982] 2 MLJ 177;

(iv) *Loganathan v Lembaga Kelayakan Profesion Undang-Undang* [1997] 5 MLJ 237.

[28] I am of the view that the filing of the three OS is not an abuse of the process of the court. The applications by the plaintiffs in the three OS are in relation to the status of their CLP results and their rights in respect of the said CLP examination paper which they had passed. So, surely it is a matter on which the court has the jurisdiction to grant the declaratory relief by virtue of s 41 of the SRA. The section reads:

> Section 41, any person entitled to any legal character, or to any right as to any property, may institute a suit against any person denying, or interested to deny, his title to the character or right, and the court may in his discretion make therein a declaration that he his so entitled, and the plaintiff need not in that suit ask for any relief.
>
> Provided that no court shall make any such declaration where the plaintiff, being able to seek further relief that a mere declaration, title, omit to do.

[29] In fact this was the approach taken by Abdul Kadir Sulaiman J (as he then was) in *Loganathan a/l PL Suppiah v Lembaga Kelayakan Profesion Undang-Undang Malaysia*. The plaintiff in that case, in the second prayer, sought for a declaration that the examination by the defendant on Criminal Procedure Paper and Professional Practice Paper for the examination in August 1996 and the subsequent marking thereof be null and void and that the plaintiff entitled to the CLP. Abdul Kadir Sulaiman J dealt with the issue on the following manner (at p 246):

> I find there was merit in the submission of the plaintiff that having been given the opportunity for the plaintiff to sit for the examination in August 1996, and having sat for the examination, there was basis for the plaintiff to expect to succeed in his attempt. He was dissatisfied with the results of the examination and asked for a declaration to his second prayer. To that extend, he was entitled to pray as he did in his second prayer earlier mentioned. Whether he would succeed in his application as prayed for in the second prayer was a matter of argument and determination on the merits at which other considerations, such as the exercise of discretion of the court in granting declaratory orders will have to be taken into account in the circumstances of the case.

[30] Similarly, in the instant case, the applications by the plaintiffs were in relation with the status of their results and their rights in respect of the July 2001 examination which they had passed. No doubt the effect of the declaration would be tantamount to the granting of *certiorari* or *mandamus* by implication. But the nature of

declaratory relief is such that even so often the relief when granted will invalidate some offending action or decision. To argue that therefore no declaration should be granted would be to set limitation on granting of declaratory relief against the established judicial opinion that the power of the court to grant declaratory relief is almost unlimited and only limited by its discretion.

[31] Thus, with respect, I am unable to associate myself with the high court cases referred to by Mr KK Wong. The four high courts cases in dealing with O 53 RHC, relied heavily on the principle laid down by Lord Diplock in the House of Lords case of *O'Reilly v Mackman* [1988] AC 533. In that case, the applicant applied for declaratory relief in disputing the punishments awarded by a board of prison visitors on grounds, inter alia, of breach of rules of natural justice. The House of Lords held that:

> A person seeking to establish that a decision of a public authority infringes rights he is entitled to have protected under public law must as a general rule proceed by way of an application for judicial review under O 53 r 1(1). Since a prisoner's right that a board of prison visitors should act within its jurisdiction and observe the rules of natural justice when conducting a hearing concerning him is a right protected only under public law and not by principle law, a prisoner who seeks to challenge a decision of a board of prison visitors must do so by way of an application under O 53 for judicial review of the board's decision.

[32] The English O 53 is *pari materia* with our O 53 RHC. But, I am of the view, our courts should be slow in accepting or adopting the *O'Reilly v Mackman*'s principle because there have been a long line of subsequent English decisions from the House of Lords and the Court of Appeal which have deviated from and distinguished themselves from the strict interpretation in *O'Really v Mackman*.

[33] In *Roy v Kensington & Chelsea & Westminster Family Practitioner Committee* [1992] AC 624, Lord Lowry said the followings:

> The 'broad approach' was that the rule in *O'Reilly v Mackman* did not apply generally against bringing actions to vindicate private rights in all circumstances in which those action involved a challenge to a public law act or decision, but it merely required the aggrieved person to proceed by judicial review only when private law rights were not at stake. The 'narrow approach' assumed that the rule applied generally to all proceedings in which public law acts or decisions were challenged, subject to some exception when private law rights were involved. There was no need in *O'Reilly v Mackman* to choose between these approaches but it seem clear that Lord Diplock considered himself to be stating a general rule with exceptions.

[34] In *Lonhro plc v Tebbit and Another* [1992] All ER, the Court of Appeal, inter alia, held:

> Furthermore, since the plaintiff was asserting a private law right, albeit arising out of a background of public law, the right could be asserted in an action by writ without the necessity to apply for judicial review before bringing the action. Accordingly, the plaintiff's

claim ought not be struck out as disclosing no reasonable cause of action or as an abuse of process of the court.

[35] Lord Woolf MR in the Court of Appeal case of *Trustee of Dennis Rye Pension Fund & Anor v Sheffield City Council* [1998] 1 WCR 840 held:

> Having established the foundation of the general rule it seems to me that there will be a reduction in difficulties which are apparently experienced at present by practitioners and the courts, if it is remembered that...
>
> (2) If a case is brought by an ordinary action and there is an application to strike out the case, the court should ask itself whether, if the case had been brought by judicial review when the action was commenced, it is clear leave would have been granted. If it would, then that is at lease an indication that there has been no harm to the intents judicial review is designed to protect. In addition the court should consider by which procedure the case could be appropriately tried. If the answer is that an ordinary action is equally or more appropriate than an application for judicial review that again should be indication the action should not be struck out.

[36] Thus, from the line of English decisions cited above, all favouring a broader approach and literal approach to *O'Reilly v Mackman*'s principle, I am not persuaded by Mr KK Wong's contention that the three OS ought to be struck off as being an abuse of process of court. Accordingly, it is my view that the three OS were properly brought before this court and should be heard on its merits.

FINDINGS ON MERITS

[37] The main issue in the three OS is whether the board had acted fairly in deciding that the plaintiffs were guilty of the charges as alleged against them. Mr KK Wong submitted that the board had acted fairly at all times by:

(i) giving notice of the charges to the plaintiffs so as to enable the plaintiffs to give written explanations;

(ii) the board after considering the plaintiffs' written explanations had convened panels to inquire into the charges;

(iii) the plaintiffs are allowed to be represented by counsel during the panels' inquiry, allowed to cross-examine the board's witnesses and allowed to testify before the panels and allowed to submit on facts and law before the panels;

(iv) plaintiffs were sent notices to the attend hearing before the board so as to enable the plaintiffs to make representation in respect of the charges. The plaintiffs attended their hearing with their counsel;

(v) after the board rejected the second panel's report and found the first, second and fifth plaintiffs guilty of the charges, the board gave the first, second and fifth plaintiffs a right to mitigate and mitigation pleas by first, second and fifth plaintiffs had been made.

[38] Thus, it is contended by Mr KK Wong that the board had actually bent backward to accommodate the plaintiffs and as such the plaintiffs have no reason to complaint. It is also the submission of the Mr KK Wong that the board had considered all relevant considerations in coming to its decision in finding the plaintiffs guilty of the charges.

[39] I am of the view that Mr KK Wong's submission is only true in respect of third and fourth plaintiffs. To me, the third and fourth plaintiffs have no grounds to complain. In this case, the third plaintiff was charged with four charges ie, receiving from Ramli bin Md Mokhtar the question papers for the subjects of Civil Procedure, General Paper, Criminal Procedure and Professional Practice before the date of the examination. The fourth plaintiff was charged with two charges, ie receiving question papers for the subjects of Professional Practice and Evidence also from Ramli bin Md Mokhtar. The first panel after a throughout inquiry had found the charges against them proven. The board accepted the panel's report and found them guilty of the charges.

[40] Mr PM Mahalingam acting for the third and fourth plaintiffs submitted that the first panel had erred in facts and law in coming to the conclusion that the charges against the two plaintiffs were proven. Mr PM Mahalingam submitted the findings of fact of the first panel is not supported by evidence and that the first panel had taken into account inadmissible evidence as well as failed to take into account the contradictions in the testimony of the witnesses who testified against the third and fourth plaintiffs. Hence, he urged this court to set-aside the finding of the panel against the third and fourth plaintiffs and consequently the board's decision in finding them guilty of the charges.

[41] With respect, I do not think I am permitted to do so. It is trite law that in a proceeding of this nature, the court's function is only to review the decision of the public authority and not to act as an appellate body and rehear the case. But, if it can be shown that the finding of the public authority is perverse or totally unsupported by evidence the court is without doubt has the duty to intervene. In the instance case, after examining the first panel's report, I am unable to hold that the findings of the panel are perverse, or totally unsupported by evidence. I am also unable to hold that the panel had considered irrelevant considerations or acted unfairly.

[42] It is my judgment, that the investigation conducted by the panel on the wrong doings of the third and fourth plaintiffs was fair and throughout. The third and fourth plaintiffs were allowed to be represented by counsel during the panel's inquiry, allowed to cross-examine the board's witnesses, allowed to testify and allowed to submit on facts and law before the panel. I have no reason to interfere with panel's findings. This is especially so when the findings of the panel were based on witnesses' credibilities. The panel is evaluating the evidence of the third plaintiff stated as follows:

> In cross-examination the accused said he came to know Ramli in 1997 or 1998 at the counter of the Lembaga Kelayakan Profesion Undang-Undang, Malaysia ie, about the time he registered to sit for the Peperiksaan Sijil Amalan Guaman. He then claims he gave Ramli

a few hundred dollars in respect of some cases (purportedly cases for solicitors' legal services) that were referred to him by Ramli which he passed on to law firms other than Messrs Lee Hishamuddin where he worked. This matter cannot be dismissed as inconsequential. One could ask as to why these cases should be referred to another law firm. Without going into all kinds of propositions we see a cunning mind, a cunning behaviour, if not just a bankrupt explanation. Further he said he had also given some loans to Ramli with an apparent understanding that the loans would be deducted from dues forthcoming from cases extended to him but then by his own admission all the cases extended to him by Ramli had no merits. This is a poor attempt to portray superior knowledge with nothing to support as to who decided the merits or demerits of the cases referred. By his own admission the loans were not repaid. It is not plausible that he gave money to Ramli for cases which he gave to law firms, for if at all any money is to be paid it should be paid by the recipient law firms. But he admits he paid Ramli. He admits Ramli did not repay the loans. The episode of the handphone, the payments to Ramli in respect of cases with no relevant explanations, the failure of Miclamani to take action to recover the handphone and the failure of Ramli to defend himself and establish his innocence do not assist in explaining Miclamani's innocence. It is on the contrary incriminating. He has stumbled at this hurdle to explain his various nebulous transactions with Ramli. His attitude and demeanor did not go unnoticed. In context, time and purpose there is only one plausible conclusion and that is he needed the examination papers to pass because time was running out on him.

[43] With regards to the testimony of the fourth plaintiff, the panel found as follows:

His credibility is in question. He has also stated in cross-examination that he had given (RM300 to RM400) not as a loan but as an advance commission for an aborted land sale for Ramli. He said his wife and Ramli's wife are working in Subang Jaya Medical Centre in different departments but he does not know her. It is inconceivable that the accused who is in state of conflict in his answer during the inquiry could be giving credible answers in regard to his relationship with Ramli.

[44] Clearly, the panel did not believe the third and fourth plaintiffs explanations. The panel found the charges against them as proven. The board accepted the panel's findings and after giving the third and fourth plaintiffs the right to be heard on the panel's findings, adopted the findings and found the third and fourth plaintiffs guilty of the charges. Hence, I have no reason to review decision of the board against the third and fourth plaintiffs. Their applications is hereby dismissed with costs.

[45] I am unable to say the same with regard to the decisions of the board in respect the first, second and fifth plaintiffs. This is because the findings of the second panel were clear and unequivocal that there was no evidence before us, circumstances or otherwise, that will allow us to conclusively hold that the student was guilty. But in spite of the second panel's findings the board decided otherwise. The question is, on what basis did the board found the first, second and fifth plaintiffs guilty of the charges.

[46] To me, the board has no basis to conclude that the first, second and fifth plaintiffs were guilty of the charges. No doubt, the first, second and fifth plaintiffs

were called again to appear before the board to answer the charges, but at the hearing before the board, the board heard no witnesses and perused no new documents. Thus, it appears to me that the board relied solely on the report of the second panel in deciding on the guilt of the first, second and fifth plaintiffs. But as stated earlier the second panel found the three plaintiffs not guilty of the charges.

[47] Mr KK Wong relying on the Court of Appeal's judgment in *Chan Kwai Chun* submitted that the board is not obligated to adduce first hand evidence but merely to show that it had considered all relevant facts and disregarded irrelevant facts. According to him the board which is not a court empowered to summon witnesses, is not confined to consider only legally admissible evidence, but also entitled to consider hearsay sources, as long as it is relevant.

[48] With respect, the argument may be valid if the board had not appointed the panel to investigate the charges against the three plaintiffs. But in this case, the board had chosen delegate its power to investigate the charges against the three plaintiffs to the second panel. A full inquiry was conducted by the second panel where evidence were recorded from witnesses, including the plaintiffs. The witnesses as well as the plaintiffs were subjected to cross-examination and at the conclusion of the inquiry, the second panel found that there was no evidence to hold the students ie, the first, second and fifth plaintiffs, guilty of receiving the question papers from Ramli bin Md Mokhtar before the date of the examination. Hence, there was no basis for the board to conclude that the first, second and fifth plaintiffs were guilty of the charges.

[49] It is also my judgment that the English Court of Appeal in *Herring v Templeman* [1973] 3 All ER 569 cited by Mr KK Wong to support his argument is of little assistance to his case. The facts in *Herring v Templeman* is distinguishable. In *Herring v Templeman*, the academic board of the teaching-training college sent a report to the governing body about its recommendation for the dismissal of the plaintiff. In the report the academic board outlined the course of events that had led to its recommendation. The governing body resolved unanimously to accept the recommendation from the academic board after inviting the plaintiff to give his reasons why he should not be dismissed.

[50] However, in the instant case the board rejected the panel's report which had earlier found the charges against the first, second and fifth plaintiffs as not proven. The board instead found them guilty with no new evidence of whatsoever nature before the board which could enable it to reject the findings of the panel. From the manner the proceedings before the board were conducted, it was obvious that board did not conduct another inquiry. The board relied solely on the report of the second panel. Hence, it is my view that the board's findings were completely unsupported by evidence. As stated earlier, a finding with having no evidence to support is clearly an error of law.

[51] In conclusion, I am of the view, since a throughout inquiry was conducted by the second panel on the charges against the first, second and fifth plaintiffs and they

were found not guilty of the charges, ie obtaining the question papers from Ramli bin Md Mokhtar, they are therefore entitled to have the results of the CLP examination obtained in 2001 to be reinstated. Accordingly, the first, second and fifth plaintiffs' respective application is allowed with costs.

First, second and fifth plaintiffs' application allowed with costs whereas third and fourth plaintiffs' application dismissed with cost.

Reported by Sally Kee